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In The

Supreme Court of the United States

October Term, 1980

No. 80-1446

IRENE LAVIN,
Petitioner,

vs.

THE COMMITTEE OF BAR EXAMINERS
OF THE STATE BAR OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Committee policy permitting the transfer of passing status achieved on different sections of the General Bar Examination over subsequent administrations, but prohibiting the transfer (i.e., the combination) of numerical scores achieved on the different sections at different administrations of the examination, operates to deprive petitioner of equal protection of the law.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Committee of Bar Examiners of The State Bar of California, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the order of the

Supreme Court of California. The Supreme Court order denied review of the determination of the Committee of Bar Examiners that petitioner should not be certified to the state high court for admission to practice law because she has not yet passed the final bar examination required to be taken and passed by all general applicants for admission.

RESPONDENT'S STATEMENT

Petitioner has been refused certification for admission to practice law in California because she has not passed the final California Bar Examination, as required by California statute, California Business and Professions Code section 6060(f). It is petitioner's contention that she was denied due process and equal protection of the law by the manner in which the Committee determined that she has not passed the examination.

Admittance to practice law in the State of California is by the Supreme Court of California following certification of eligibility by the Committee of Bar Examiners. (The Committee.)

The Committee is established by the Board of Governors of the State Bar pursuant to Business and Professions Code section 6046. Persons refused certification for admission by the Committee may petition to have that decision reviewed by the California Supreme Court in accordance with procedure adopted by that Court. Business and Professions Code section 6066, rule 952(c), California Rules of Court. This is the procedure followed by petitioner, but the Court declined to grant review.

The final bar examination consists of the General Bar Examination and the Professional Responsibility Examination.

Rule XI, Rules Regulating Admission to Practice Law in California.*

Petitioner first took the California General Bar Examination in July 1974. At that time, and at all relevant times since, the General Bar Examination has consisted of two parts: an essay examination and the Multistate Bar Examination (MBE).

From July 1974 to the February 1977 examination, the only way to pass the examination was to obtain a score of not less than 70% of the highest possible total of the combined essay and MBE portions of the examination. Although petitioner took the examination six times during this period (the examination is given twice a year), she failed to pass.

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* The Rules Regulating Admission to Practice Law in California have been adopted pursuant to provisions of the State Bar Act, California Business and Professions Code section 6000, et seq. See section 6047. The rules are set out in West's Annotated Business and Professions Code following section 6069.

In April 1977, the Committee adopted and announced that until further notice, there would be two methods of passing the examination. The first alternative is to pass the whole examination given at a single administration. To achieve this, an applicant must receive not less than 70% (currently 1050) of the total possible points (currently 1500) in the whole examination.

The second alternative is to pass the examination in sections. This may be accomplished by passing the MBE and essay sections separately at different administrations within a period of 21 months. Under this alternative, an applicant who receives a score of 70% or more on either the MBE (currently 420 points) or the essay (currently 630 points) section of a General Bar Examination administered in July 1979 or later, and who in any subsequent General Bar Examination taken within 21 months

after such earlier examination, will be deemed to have passed the entire examination. Numerical scores achieved on different sections of the examination at different administrations cannot be combined for any purpose. Thus, an applicant who may have received a higher score than 70% on one section cannot combine that score with a less than 70% score on the other section to claim a 70% or higher score on the whole examination.

Applicants are not required to make a formal election between the alternative methods. They may take either or both sections of the examination at any administration. An applicant who chooses to take the entire examination at a single administration will not be precluded from passing the examination in sections, and an applicant who chooses to take only one section of the examination will not be precluded from attempting to pass the

entire examination in a single administration at a later time. An applicant who has passed one section of the examination will not lose credit for doing so if the applicant subsequently retakes that section of the examination at a later administration and fails.

Although the second alternative method of passing the bar examination permits applicants to pass the examination by passing the MBE and essay sections at different times, the scores earned on different administrations of the MBE and essay sections may not be combined, even if the sum of the points scored exceeds the total score necessary to pass the examination at a single administration.

All applicants are fully informed of these alternatives by the Committee, and indeed petitioner included as exhibit A to her Petition for Review in the California Supreme Court a document dated February 1979

published by the Committee and entitled "Alternative Methods of Passing The California General Bar Examination" (Alternative Methods).

It is important to note that Alternative Methods contained the following advice to applicants:

> "To take maximum advantage of both methods of passing the General Bar Examination, it is recommended that an applicant take both the MBE and essay sections. Even if the applicant has previously passed one section of the examination, the Committee of Bar Examiners suggests that all applicants retake both the MBE and essay sections on any subsequent attempts. Taking only a single section limits the applicant's chances of passing to only a single method, rather than giving the applicant two alternative methods to pass the examination." (Emp. added.)

Alternative Methods, p. 2.

Since the July 1977 examination (the first one under the policy permitting taking the examination in sections), petitioner has taken the essay examination six times and failed to pass it. She has

taken the MBE three times and passed it in July 1977 and July 1979.*

In the fall 1979 General Bar Examination, the lowest possible passing score was 1050 points. The essay portion of the examination consisted of nine questions each worth 100 points for a total of 900 points. A passing score on this portion was 630 points (70% of 900). The total score possible for the MBE was 600 points with a passing score of 420 (70% of 600). At that examination, petitioner passed the MBE with a total of 437 points. However, on the essay portion of the examination she received only 577.5 points. She thus failed to pass the examination at one sitting because her total number of points was 1014.5 (1050 passing).

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* These facts were before the Supreme Court of California in the Declaration of Kenneth D. McCloskey, Director of Examinations for the Committee of Bar Examiners, attached as appendix B to respondent's Memorandum in Response to Petition for Review filed in the California Supreme Court proceedings.

Because petitioner had passed the MBE in fall of 1979, she could thereafter complete passage of the general examination by passing the essay portion of the examination within 21 months. She could also thereafter, as suggested by the Committee, take both portions of the examination again in an attempt to achieve an overall passing score of 70%. She could not, however, use the extra points obtained in the fall 1979 MBE to offset a possible deficiency occurring in a subsequent taking of the essay examination.

As previously stated, petitioner was not required to limit herself by retaking only the essay portion of the examination, and indeed the Committee's Alternative Methods publication suggested she do otherwise. Further, the Committee publication, Alternative Methods, specifically warns each applicant that "The numerical scores achieved on different sections of the

examination at different administrations are not combined for any purpose." (Emp. added.) Exhibit A, Petition for Review, filed with California Supreme Court.

In the spring of 1980, petitioner made the election of taking only the essay portion of the examination. On this examination petitioner received 617.5 points. As 630 points was necessary to pass the essay examination, she failed. Because she did not retake the MBE, she had no possible extra points to balance a 12.5 point deficit on the spring 1980 essay.

However, she now asserts that the constitution requires that the Committee combine her fall 1979 MBE numerical score (437 points) with her spring 1980 essay score (617.5 points).

Petitioner makes no claim that she was unaware of the Committee standards nor that she was misled by the Committee.

ARGUMENT

I

PETITIONER HAS SET FORTH NO GROUNDS THAT BRING HER PETITION WITH THE AMBIT OF RULE 17.

A review on writ of certiorari is not a matter of right, and will be granted only when there are special and important reasons therefor. Rule 17, Rules of the Supreme Court of the United States, sets forth nonexclusive guidelines as to what the Court considers in deciding whether to grant a writ of certiorari. The present case falls within none of these guidelines.

Since petitioner seeks review of a decision by the highest court of a state, rule 17.1(a) is inapplicable in that this particular portion of the rule pertains to decisions rendered by a federal court of appeals.

Petitioner's case also does not fall within rule 17.1(b) which indicates that a

writ of certiorari can issue when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court or a federal court of appeals. Petitioner has cited no authority, federal or state, that indicates that the decision of the Supreme Court of California was in conflict with the decision of any other court.

Finally, this case does not come within the guidelines of rule 17.1(c); there is at issue no important question of federal law that requires settlement by this Court. The method by which Califorinia determines who is qualified to practice law before its courts is an issue that should be left to California in the absence of the violation of some overriding federal constitutional right of petitioner, and in this regard we respectfully submit petitioner's equal protection contentions are without merit.

II

THE RATIONAL RELATION TEST IS THE CORRECT STANDARD TO USE TO WEIGH EQUAL PROTECTION CLAIMS IN ATTORNEY ADMISSION PROCEEDINGS, AND THIS SHOULD NOT BE CHANGED.

Since Schware v. Committee of Bar Examiners of New Mexico, 353 U.S. 232, 239, 77 S.Ct. 752, 756 (1975), it has been recognized that the determination of who may be admitted to practice law before the highest court of a particular state is a matter to be decided under state law absent the imposition of some qualification which lacks "a rational connection with the applicant's fitness or capacity to practice law." This was followed by the Supreme Court of California as recently as 1980 in a reported bar admission case. Bib'le v. The State Bar of California, Committee of Bar Examiners, 26 Cal.3d 548 (Feb. 1980); certiorari denied 101 U.S. 163 (Oct. 1980).

Petitioner would have the Court now for the first time adopt a higher "middle tier" standard of equal protection analysis for review of State Bar admission requirements. The case law, however, does not support such "middle tier" review in other than, perhaps, gender related cases, and even if it did, the Committee of Bar Examiners' requirement that an applicant for admission obtain an overall passing score of 70% on the MBE and sections of the examination if taken at one administration, or a passing score (i.e., 70) on each section if attempted to be passed at different administrations, clearly passes equal protection scrutiny.

Petitioner asserts the Court should make this extraordinary change in the law because California has established a "multistage procedure for admission" and employed "discriminatory grading rules" in the "fourth and final examination." Peti-

tion for Writ of Certiorari to the Supreme Court of California, pp. 6-9. However, California does not have a "multistage procedure for admission" nor were "discriminatory grading rules" employed in grading petitioner's examination.

Petitioner does not say what "discriminatory grading rules" were employed against her. There is no allegation, nor can there be, that petitioner was discriminated against because of race, religion, national origin or sex.

It should be remembered that petitioner has repeatedly failed an examination that thousands have passed. Also, the "class" in which petitioner finds herself is one of her own choosing. In fall 1979, she passed the MBE but failed the essay examination. In spring of 1980, she had a choice of retaking the entire examination in either manner she believed, for whatever reason, would make the examination the easier to

pass. The decision was petitioner's; it was not the Committee's. Petitioner made her election and became a member of a particular class, i.e., one who has retaken only a portion of the examination and must therefore pass that portion without assistance from whatever score she might have obtained on past examinations. All applicants in this class must pass the same examination, and petitioner has not alleged otherwise. Petitioner attempts to compare her position with others who chose to take the entire examination - both the MBE and the essay - at one sitting. However, her position is not comparable.

While we can only speculate as to why any applicant would make either election, the reasons seem obvious. Those who take both portions of the examination have an opportunity to balance a deficiency on one portion of the exam with any surplus that might be earned on the other portion. How-

ever, there is obviously an increase in the physical, mental and emotional burdens on an applicant who attempts both parts of the examination at the same time as compared with what is obviously the less difficult burden of taking only one portion at a time. An applicant who elects to take only one portion has less days of examination to sit for.

In the spring of 1980, petitioner made her election and chose her own "class". Her examination papers and those of all other persons who elected to put themselves into that class were graded in an identical fashion, and the decisions as to whether or not they passed the bar examination were all made by the same standard. There was no "discrimination".

Also, it is clear that petitioner misconceives the nature of the California bar admission procedure. It is not a "multistage procedure for admission". There

are, it is true, multi-requirements for admission to the bar. All must be met in order to be certified for admission. These include being 18 years of age (§ 6060(a)), the demonstration of good moral character (§ 6060(b)), the completion of two years of college work or its substitute - passing an equivalency examination (§ 6060(c)), registration with the Committee upon commencing to study law (§ 6060(d)), graduation from a law school accredited by the Committee (§ 6060(e)(1)(2), or graduation from an unaccredited law school or study for four years in a lawyer's office or a judge's chambers (§ 6060(e)(3)), passage of the final bar examination (§ 6060(f)) and passage of the first-year law students' examination, except that this is not required of persons completing one year of study at an accredited law school (§ 6060(g)).

Petitioner was required to pass the college equivalency and first-year law students' examinations only because she could not meet the educational requirements of section 6060(c), and because she attended an unaccredited law school. Most applicants to the California bar attend accredited law schools and are not required to take either of these examinations.* Passage of these two examinations is not a "stage" in the "admission process" any more than completion of year-end examinations each year at an accredited law school would be so considered.

The Professional Responsibility Examination (PRE) is part of the final bar examination, although it is given by the National

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* In the fall of 1978, for example, the General Bar Examination was administered to 7,645 applicants. Of these, 6,099 were from accredited law schools and were not required to take the first-year law students' examination (or were exempted therefrom by satisfactorily completing the first year of law study at an accredited law school before transferring to an unaccredited school). 55 State Bar Journal 91 (Feb. 1980).

Conference of Bar Examiners. It may be taken at any time after a student has completed one year of law study. Rule XI, section 113, Rules Regulating Admission to Practice Law. The essay and MBE examination are the two parts of the General Bar Examination. They are usually taken together, and were taken together by the thousands of applicants who passed the examination the first time.

In short, California does not require applicants to take qualifying examinations over a period of time. California does require adequate legal education, demonstrated by attendance at an accredited law school or a satisfactory substitute, and passage of a final bar examination that consists of three parts. However, there is no particular order of taking the examinations required and, in fact, two of the three parts (the essay and MBE) are very often taken and passed at the same time.

It is respectfully submitted that the interest of the state in determining who is qualified to practice law before its courts requires the continued application of the rational basis test to state admission procedure.

III

THE COMMITTEE'S REFUSAL TO PERMIT BAR APPLICANTS TO PASS THE EXAMINATION BY COMBINING ARITHMETICAL SCORES OBTAINED ON SEPARATE ADMINISTRATIONS OF THE EXAMINATIONS HAS A RATIONAL BASIS AND SERVES A VALID STATE INTEREST.

There can be no doubt that California has a valid state interest in insuring that only qualified applicants are certified to the Supreme Court for admission to practice law. The testing procedure at issue in this proceeding helps to further that purpose by insuring, so far as possible, that persons are not admitted to practice law through a fluke.

The Supreme Court of California had before it in the proceedings below, the Declaration of Stephen P. Klein, Ph.D., an authority on educational testing and its measurement. Dr. Klein has served as consultant to the Committee for the past four years.*

As Dr. Klein stated: "... the policy of allowing applicants to transfer a passing status across administrations of the examination was adopted so as to allow those who failed only one of the two parts on a previous examination to concentrate their preparation time on the part they had failed." Klein Declaration, paragraph 7. "The requirement that only a passing status and not the score on a part be transferred across examinations was adopted so as to

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* The Declaration of Dr. Klein is appendix C to respondent's Memorandum in Response to Petition for Review filed in the proceeding before the Supreme Court of California.

prevent an applicant passing the General Bar Exam solely as a result of a chance flunctuation in scores." Klein Declaration, paragraph 9.

"Recognition that capitalizing on chance might lead to an erroneous overall pass/fail decision, even if only rarely, led to the requirement that the pass/fail status and not the score on a part be transferred across administrations." Klein Declaration, paragraph 17.

> "Finally, the old rule which required all applicants to take both parts of the examination on each administration was relaxed in 1978 to allow applicants to transfer a passing status on a part across administrations. The petitioner is requesting to relax this requirement still further by allowing the transferring of the scores themselves. Such liberalization cannot be justified on a statistical basis since it would result in capitalizing on any chance variation in the scores which in turn would jeopardize the reliability of the pass/fail decision-making process."

Klein Declaration, paragraph 21.

The statements in the Klein Declaration support a determination that the Committee's procedures which are here in issue serve a valid and legitimate state purpose; they prevent, so far as possible, chance playing a part in determining who is qualified to practice law.*

Petitioner makes no charge of fraud, imposition or coercision as reason for her failure to pass the examination. The Supreme Court of California has long held that,

> "... if any dissatisfied applicant can show that he was denied passage of the State Bar examinations through fraud, imposition, or coercision, or that in any other manner he was prevented from a fair opportunity to take the

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* Dr. Klein's analysis is born out by the facts in petitioner's case. As Dr. Klein shows, petitioner has taken the examination over 12 administrations. There are 108 different combinations of scores for petitioner on these administrations. If petitioner's best MBE and essays were summed, under current weighing of the examination parts, only two of the 108 combinations would yield a passing score. Only by capitalizing on the slight chance variation in scores across administrations would petitioner pass, and then only about one percent of the time. Klein Declaration, paragraphs 15 and 16.

> examination, this Court will be willing to listen to his complaint. Inability to pass the examinations, which are successfully passed by other applicants, will of course, not be inquired into by the Court."

Staley v. State Bar 17 Cal.2d 119, 121 (1941).

Petitioner has failed to pass an examination through either of the procedures authorized by the Committee; procedures that were applied to and met by thousands of other applicants.

Petitioner would now have this Court mandate a third procedure.

We urge the Court not to do so.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Dated: March 25, 1981

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, certifies that three copies of the RESPONDENT'S BRIEF IN OPPOSITION have been served on counsel of record for the party herein by mailing same, first-class postage prepaid, this, the 1st day of April 1981, as follows:

Edward J. Horowitz
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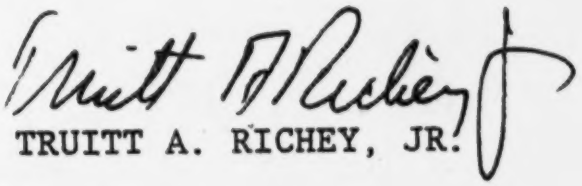
All parties required to be served have been served.



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